

**ARIZONA SUPREME COURT  
CRIMINAL RULES VIDEO-CONFERENCE ADVISORY COMMITTEE  
MEETING MINUTES  
May 1, 2009**

Members Present:

Hon. Antonio Riojas, Chair  
Hon. Gary Donahoe  
Hon. K.C. Stanford  
Hon. Samuel Goodman  
Amelia Cramer  
Sally Wells  
Robert Hirsh  
Capt. Charles Johnson  
Bob James  
Jeremy Mussman  
Kent Batty  
Deborah Schaefer  
Capt. Rodney Mayhew

Guests:

Stewart Bruner  
Theresa Barrett

Members not Present:

Terry Stewart

Staff: Patience Huntwork, Mark Meltzer, Lorraine Nevarez

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**1. Call to order.** The meeting was called to order at 10:00 a.m. The draft minutes of the April 7, 2009, meeting were unanimously approved.

**2. Meeting summary.** This meeting focused on adopting amendments to Rule 1.6 that the Committee will recommend to the Arizona Judicial Council. Mr. Mussman and Judge Donahoe submitted separate proposals for amending Rule 1.6, and staff provided a set of “best practices”, which were considered by the members at this meeting.

**3. Mr. Mussman’s proposed version of Rule 1.6.** Mr. Mussman introduced the features of his draft proposal:

- Interpreters would be required to be at the defendant’s location.
- The proposal enumerated specific proceedings where the court had discretion to utilize video-conferences. Mr. Mussman believed that his proposed version of Rule 1.6 followed the directive of A.O. 2008-92 to make recommendations concerning “the types

of proceedings for which video-conferencing could be utilized”. His proposed version would permit the court to exercise discretion in using video-conferences for arraignments and similar “housekeeping” matters such as omnibus hearings, informal conferences under Rule 32.7, and pretrial conferences and motions to continue where time is not waived.

- Other proceedings could be done under this version by stipulation. Mr. Mussman’s view was that if the video-conference was done appropriately, that the defendant would probably agree to it, but that the defendant should have a choice on the matter. He believed that if the defendant was required to appear by video-conference, it might adversely impact the attorney-client relationship.
- Video-conferences could also be done on a finding of “compelling circumstances”, for instance, where a defendant is out-of-state or has a communicable disease.
- If the scope of a video-conference “expanded”, the court could require the defendant’s personal appearance.
- Mr. Mussman characterized the “best practices” as “aspirational”, and cautioned that if these were not required, they would not be done. He proposed changing these to standards, and making them mandatory.
- Mr. Mussman believed that the Sixth Circuit opinion of *Terrell v USA* was significant because it relied on decisions of the U.S. Supreme Court for principals of statutory interpretation.

Members made the following responsive comments:

- The language in Judge Donahoe’s version (“except as provided by law”), addresses the *Terrell* issue by deferring to the legislature any requirements the legislature may impose regarding personal appearances in criminal proceedings.
- The U.S. Supreme Court has not yet established whether an initial appearance can be done by video-conference under the federal constitution, and this determination would transcend any Arizona legislation on the issue.
- The language in A.O. 2008-92 about the “types of proceedings” would allow for generic rather than specific identification of types of proceedings.
- The attorney-client relationship is fostered by out-of-court contacts.
- Remote interpreters work well. One Florida circuit court has a program which uses them routinely.
- The law does not require an in-person appearance to waive time.

**4. Judge Donahoe's proposed version of Rule 1.6.** Judge Donahoe discussed features of his proposed version and distinguished those from Mr. Mussman's:

- Best practices or standards would be deferred to the AOC.
- Felony trials and felony sentencing are excluded from the scope of his proposal. A felony change of plea would require a stipulation if it is going to be done by video.
- Initial appearances and arraignments may be done by video-conferencing.
- A "laundry list" of proceedings that may be done by video-conferencing would be problematic, because these are commonly known by different names in various courts. It is preferable to give courts broad discretion in deciding which proceedings should be done by video. The rule is not mandatory; it gives local courts discretion to not utilize video.
- The hearing in Terrell, if it had been conducted under this proposed version of the rule, would have required a stipulation, because witness testimony would have been taken. In any event, Terrell is not binding on Arizona courts, and it's inconsistent with decisions in other states which this committee has considered.

Member comments included the following:

- Under Judge Donahoe's version, the confrontation and due process requirements appear to be satisfied for initial appearances. There is no compelling argument that a defendant's constitutional rights would be infringed, nor that any injustice would result.
- The phrase "taken before a magistrate" in Arizona statutes, unlike the language in Terrell, may have ambiguity.
- There is no Arizona case law on the constitutionality of video-conferencing, but no one can say that a defendant's rights would not be impacted under Judge Donahoe's proposed rule. Lawyers making arguments from a jail will be at a disadvantage with lawyers appearing in the courtroom.
- Arizona's rule goes beyond rules adopted by other states. Many more proceedings are going to be done by video solely for expediency and cost savings.
- Wisconsin's use of video is broader than what is being proposed by Judge Donahoe.

Judge Donahoe reminded the members that under his proposed rule, every judicial officer will have discretion to determine if video is appropriate, or if prejudice might result. The proceedings which defense counsel are objecting to (such as a voluntariness hearing, a motion to suppress, or a probation violation hearing, are witness-based, and therefore could only be conducted by video with a stipulation from the defendant. Rule 11 hearings typically involve stipulations to submit the mental health issue on written reports, but if there is a hearing at which

a witness will testify, the defendant will have the options of stipulating to video or appearing in person.

A suggestion was made that if Judge Donahoe's version was adopted, there will be numerous legal challenges. The broader consensus was that either Mr. Mussman's version or Judge Donahoe's version would probably be challenged, but no one can say which would be challenged more than the other.

**MOTION:** A motion was made to adopt Judge Donahoe's version, without prejudice to further amend that version.

The motion was seconded and carried: 11-2-0. CRVAC 09-011

The Committee stood in recess for ten minutes.

A series of motions to amend Judge Donahoe's version were made. The members discussed each motion that was made, and then voted on the motion.

**MOTION:** The words "any misdemeanor trial" should be inserted in paragraph D prior to the words "any felony change of plea". This would allow many low level misdemeanors to be done by video upon stipulation of the parties.

The motion was seconded and carried. 11-2-0: CRVAC 09-012

**MOTION:** A new provision, sub-paragraph (6), should be added to paragraph B. This new provision would state: "Provision shall be made for the use of interpreter services when necessary." This provision would not need to detail specific provisions, such as where the interpreter should physically be present. Rather, the intent is to require the court to consider and to address issues that might arise when an interpreter is utilized in a video-conference proceeding. Ms. Schaefer noted that foreign language interpreters in Yavapai County occasionally appear via telephone, and that sign language interpreters are usually outside the county and their needs require consideration for video appearances.

The motion was seconded and carried: 11-2-0. CRVAC 09-013

**MOTION:** Felony probation revocation hearings and felony disposition proceedings should be excluded proceedings under paragraph C, because these are equivalent to felony trials and sentencing.

The motion was seconded and carried: 9-4-0 CRVAC 09-014

Note: After the lunch recess, a request was made to substitute the word "violation" for "revocation" on the foregoing motion. The members unanimously consented to this request.

**MOTION:** The language in paragraph (b) (1) of the proposed version, which requires that a full record of the proceedings should be made "as provided in applicable statutes and rules" (this is

also the wording of the current version of Rule 1.6), should be changed to “when required by law”. The motion was not seconded.

**MOTION:** The wording in paragraph (b)(2), regarding “confidential communications between the defendant and counsel”, should be changed to “confidential communications between the defendant and defendant’s counsel”. This would clarify that a defendant may have a confidential communication with his or her own counsel, but not other counsel.

The motion was carried unanimously. CRVAC 09-015

**MOTION:** The words “including video conferencing equipment” at the end of the first sentence of paragraph (a) of Judge Donahoe’s version should be deleted. These words are also in the current version of Rule 1.6. The words are considered unnecessary and, in anticipation of future changes in technology, restrictive.

The motion was carried unanimously. CRVAC 09-016

**MOTION:** In the last sentence of paragraph (d) regarding stipulated proceedings, within the phrase “before accepting the stipulation, the court shall determine...”, the word “determine” should be changed to “find”. This would be consistent with other verbiage in the proposed rule.

The motion was carried unanimously. CRVAC 09-017

A suggestion was made that comments submitted with versions of the Rule 1.6 be edited at this time. After discussion, the Committee agreed that drafting comments to the rules should be deferred until after presentations to Committee on Superior Court (on May 15), and to the Committee on Limited Jurisdiction Courts (on May 20).

**MOTION:** In paragraph (c), after the words “Except upon the court finding extraordinary circumstances...,” the words “and a knowing and intelligent waiver” should be added. The members discussed application of this paragraph to include circumstances such as a defendant’s illness, or a defendant’s refusal to go to a court proceeding. Some members expressed that a finding of extraordinary circumstances made a waiver unnecessary.

The motion failed: 2-11-0. CRVAC 09-018

The discussion then turned to the document entitled “best practices”. The members considered changing the requirement in paragraph (a) regarding “minimum technical standards” to “best practices”. It was also questioned if “best practices” were adopted, what the process would be for changing them. At 12:05 p.m., the members took a forty minute recess for lunch. After lunch, additional amendments to Judge Donahoe’s draft version were proposed.

**MOTION:** The second sentence of paragraph (a) [requiring that the parties be able to “view and converse with each other simultaneously”] should be cut from paragraph (a) and inserted as the first requirement of paragraph (b).

The motion was seconded and passed unanimously. CRVAC 09-019

**MOTION:** The last sentence of paragraph (a) [regarding minimum technical specifications adopted by the AOC] should be stricken. This was a continuation of the discussion that had begun just before the lunch recess.

Mr. Bruner, from the Information Technology Division of the AOC, advised the members that while his best estimate of the time requiring for adopting technical standards was about one year, that there was a possibility that standards could be crafted within the next eight months, that is, by January 1, 2010. Ms. Huntwork informed the members that the status of Rule 1.6, and the work of this Committee, would probably be on the Supreme Court's rules agenda in September, 2009. The members discussed whether technical specifications should be adopted, and if so, then who should prepare them, inasmuch as the members stated that they were not qualified to draft technical specifications. The members agreed that what they had intended would be more accurately characterized as "operational guidelines" than as technical standards. Any guidelines would be applicable to all courthouses and jails, regardless of their physical characteristics and their degree of modernization. The guidelines should take into consideration the budgetary limitations of many jurisdictions, and therefore these guidelines should not be financially burdensome.

Note: The previous motion would be deemed amended. In lieu of striking the last sentence of paragraph (a), it would remain in place, but it would state as follows: "Any interactive audiovisual device must meet or exceed the minimum operational guidelines adopted by the Administrative Office of the Courts."

The motion as amended was seconded and passed unanimously. CRVAC 09-020

**MOTION:** The word "device" used throughout the proposed rule should be changed to the word "system". The interactive audiovisual equipment used by the courts is typically a "system" rather than a single "device".

The motion was seconded and passed unanimously. CRVAC 09-021

Consideration was briefly given to a proposal in staff's draft of Rule 1.6 concerning the testimony of a witness via video-conference. The members believed that this was beyond the scope of this Committee's charge, as set out in A.O. 2008-92, and the proposal was not considered further.

**ACTION:** At this point, the members agreed that a workgroup would be formed to draft proposed "operational guidelines", using staff's "best practices" document as a starting point. Ms. Cramer, Capt. Johnson, Mr. James, Mr. Mussman, and Ms. Schaefer offered to serve on the workgroup. Committee staff will coordinate members' schedules to determine a meeting date.

The Chair will present the proposed Rule 1.6 in the form agreed to by the Committee to COSC on May 15, and to the LJC on May 20, to seek their comments and recommendations.

**5. Call to the Public.** There was no response to the call to the public.

**6. Adjourn.** The meeting was adjourned at 1:35 p.m. The next meeting is scheduled for Friday, May 29, 2009, from 1:00 p.m. to 4:30 p.m., at the State Courts Building in Phoenix. This meeting is intended to address any comments and recommendations which may be received concerning the draft of Rule 1.6. The meeting will also allow for discussion and revision of a draft report on the work of this Committee.